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No. 222. 27

In the Supreme Court of the United States

October Term, [illegible] 1922

THE WICHITA RAILROAD AND LIGHT COMPANY, *Appellant,*

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS and KANSAS GAS AND ELECTRIC COMPANY, *Appellees.*

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

APPELLEES' MOTION TO DISMISS OR AFFIRM AND BRIEF OF ARGUMENT IN SUPPORT THEREOF.

A. E. HELM,
Counsel for The Public Utilities Commission of the State of Kansas, Appellee.

H. L. MCCUNE,
Counsel for Kansas Gas and Electric Company, Appellee.

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In the Supreme Court of the United States

October Term, 1921.

THE WICHITA RAILROAD AND LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS and KANSAS GAS AND ELECTRIC COMPANY, *Appellees.*

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

MOTION TO DISMISS OR TO AFFIRM.

Now come the appellees by their counsel appearing in their behalf and move the court to dismiss the appeal in the above entitled cause for want of jurisdiction for the following reason:

1. The decision of the United States Circuit Court of Appeals in this case was final. It was final because the jurisdiction of the District Court depended entirely upon diversity of citizenship, a conclusion which follows from these premises:

(a) The grounds of the United States District Court's jurisdiction averred in appellant's bill of complaint are limited to diversity of citizenship and the fact that the controversy involved in excess of three thousand dollars.

(b) The allegation in the bill of complaint that the action of the Public Service Commission of Kansas in changing existing rates was violative of Section 10, Article 1, of the Constitution of the United States, is not real or substantial, this court having decided that question adversely to appellant's contention prior to the date of the allowance of the appeal herein.

(c) The references in the bill of complaint to the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States present no real or substantial dispute as to the effect or construction of said Amendments.

(d) The decisions in the District Court and in the Circuit Court of Appeals did not involve or depend upon any constitutional or Federal question.

And the said appellees by counsel as aforesaid also move the court to affirm said judgment or decree from which said appeal purports to have been taken because from an examination of the record it is manifest that the appeal is taken for delay only and that the questions upon which it is claimed that the jurisdiction depends are so frivolous as not to need further argument.

A. E. HELM,
Counsel for the Public Utilities Commission of the State of Kansas, Appellee.

H. L. MCCUNE,
Counsel for Kansas Gas and Electric Company, Appellee.

No. ~~732~~.217

In the Supreme Court of the United States

October Term, 1921.

THE WICHITA RAILROAD AND LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS and KANSAS GAS AND ELECTRIC COMPANY, *Appellees.*

APPELLEES' BRIEF OF ARGUMENT UPON MOTION TO DISMISS OR AFFIRM.

I.

STATEMENT.

Appellant, The Wichita Railroad and Light Company, filed its bill of complaint in the District Court of the United States for the District of Kansas, April 24, 1918, by which it sought to enjoin an order of the Public Utilities Commis-

sion of Kansas, which had authorized an increase in rates to consumers of electric energy supplied by Kansas Gas and Electric Company. Thereafter appellee The Public Utilities Commission filed answer, and appellee Kansas Gas and Electric Company, by leave of court, an intervening petition. On March 5, 1919, appellant filed its motion for the entry of a final judgment and decree upon the pleadings and the cause was thereupon submitted to the court.

The District Court rendered judgment on the pleadings enjoining said order. Upon appeal the Circuit Court of Appeals for the Eighth Circuit reversed and remanded the cause with instructions to the trial court to dismiss the bill of complaint. Thereafter appellant prosecuted its appeal from the judgment and decree of the Circuit Court of Appeals.

Appellees, the Public Utilities Commission of the State of Kansas and Kansas Gas and Electric Company, have filed in this court a motion to dismiss or affirm the appeal because the decree and judgment of the Circuit Court of Appeals was final and this court is without jurisdiction to review the cause upon appeal. Said motion appears in full preceding this brief of argument. It is contended that the judgment of the Circuit Court of Appeals was final because the District Court's jurisdiction was dependent entirely upon diversity of citizenship.

II.

ARGUMENT.

Section 128 of the Judicial Code provides that the judgments and the decrees of the Circuit Courts of Appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being citizens of different states, with certain exceptions which for the purposes of this case need not be noticed.

This court in applying Section 128 of the Judicial Code has declared:

> "Where the jurisdiction of the circuit court is invoked on the ground of diverse citizenship it will not be held to rest also on the ground that the suit arose under the Constitution of the United States, unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form, such as good pleading requires; and where the case is not brought within this rule the decree of the circuit court of appeals is final."

Empire State-Idaho Mining Company v. *Hanley*, 198 U. S. 292, 49 L. ed. 1056, 25 Sup. Ct. Rep. 691.

Arbuckle v. *Blackburn*, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148.

Western Union Telegraph Company v. *Ann Arbor Railroad Company*, 178 U. S. 238, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867.

Spencer v. *Duplan Silk Company*, 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174.

Shulthis v. *McDougal*, 225 U. S. 561, 56 L. ed. 1205, 34 Sup. Ct. Rep. 704.

Roman Catholic Church v. *Pennsylvania Railroad Company*, 237 U. S. 575, 59 L. ed. 1119, 35 Sup. Ct. Rep. 729.

The converse of the rule just quoted is likewise well settled. Therefore, the sole ultimate question upon this motion is whether the instant case does or does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution of the United States. An examination of the bill of complaint and those parts of the record to which attention will be invited should persuade that the appeal should be dismissed under authority of the decisions hereinabove cited. The conclusion that the jurisdiction of the trial court depended entirely upon diversity of citizenship follows from the premises to be now discussed.

(a) The grounds of the United States District Court's jurisdiction averred in appellant's bill of complaint are limited to diversity of citizenship and the fact that the controversy involved in excess of three thousand dollars. (Record, p. 2.)

The opening paragraph of the bill of complaint avers that plaintiff therein, appellant here, the Wichita Railroad and Light Company, is a citizen of West Virginia. The second paragraph avers that the Public Utilities Commission of the

State of Kansas is a creature of the Legislature of Kansas and that its members are citizens of that state. And the third paragraph avers that the controversy involves in excess of three thousand dollars exclusive of interest and costs. There is not in the bill of complaint any statement or averment that the controversy arises under or involves in any way the construction or effect of the Constitution of the United States. Beginning with the fourth paragraph of the bill of complaint, appellant stated its alleged cause of action.

Equity Rule No. 25 requires that a bill in equity shall contain, among other things, "a short and plain statement of the grounds upon which the court's jurisdiction depends." In compliance with that rule appellant stated that the District Court's jurisdiction depended upon diversity of citizenship of the parties and the suit's involving more than three thousand dollars. Failure to include in the statement of the grounds of jurisdiction that the effect or construction of the Constitution was involved should be taken as indicative at least that no such question was substantially and really involved.

(b) The allegation in the bill of complaint that the action of the Public Service Commission of Kansas in changing existing rates was violative of Section 10, Article 1, of the Constitution of the United States, is not real or substantial, this court having decided that question adversely to appellant's contention prior to the date of the allowance of the appeal herein.

That a statute granting to a state commission authority to make rates to be charged by public service companies was not unconstitutional as being a delegation of legislative power was decided long ago in *Reagan* v. *Farmers Loan & Trust Company*, 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. Rep. 1047, and has been ever since adhered to.

Long prior to the institution of this case, and ever since, this court has declared that Article 1, Section 10, of the Constitution of the United States does not forbid rates fixed by contract with a public service company from being superseded by rates fixed by a properly constituted and acting state public service commission. *Manigault* v. *Springs*, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127; *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, 482, 55 L. ed. 297, 303, 31 Sup. Ct. Rep. 265; *Chicago, B. & Q. R. Co.* v. *McGuire*, 219 U. S. 567, 55 L. ed. 338, 31 Sup. Ct. Rep. 259; *Atlantic Coast Line R. Co.* v. *Goldsboro*, 232 U. S. 548, 558, 58 L. ed. 721, 726, 34 Sup. Ct. Rep. 364; *Rail & River Coal Company* v. *Ohio Industrial Commission*, 236 U. S. 338, 349, 59 L. ed. 597, 615, 35 Sup. Ct. Rep. 359; *Union Dry Goods Company* v. *Georgia Public Service Corporation*, 248 U. S. 372, 63 L. ed. 309, 39 Sup. Ct. Rep. 117; *Kansas City Bolt & Nut Company* v. *Kansas City Light & Power Company*, 252 U. S. 571, 64 L. ed. 721, 40 Sup. Ct. Rep. 392.

In *G. & C. Merriam Company* v. *Syndicate Publishing Company*, 237 U. S. 618, 59 L. ed. 1148, 35 Sup. Ct. Rep. 708, it was said:

> "The circuit court of appeals' decree, affirming the decree of the district court, was final unless, in addition to the allegations of diverse citizenship which were contained in the bill, there was an averment of a cause of action and consequent basis of jurisdiction arising under the Constitution or statutes of the United States. *Macfadden* v. *United States*, 213 U. S. 288, 53 L. ed. 801, 29 Sup Ct. Rep. 490; *Shulthis* v. *McDougal*, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704. If the jurisdiction of the District Court was invoked on the ground of diversity of citizenship and the averment as to a right arising under the Federal Constitution or statutes was unsubstantial and without real merit, either because of its frivolous character upon its face or from the fact that reliance was based upon a claim of Federal or statutory right denied by former adjudication of this court, then the appeal to this court must be dismissed. *Newburyport Water Company* v. *Newburyport*, 193 U. S. 561, 576, 48 L. ed. 795, 799, 24 U. S. Sup. Ct. Rep. 553; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311, 47 L. ed. 190, 192, 23 Sup. Ct. Rep. 123."

And in *Brolan* v. *United States*, 236 U. S. 216, 59 L. ed. 544, 35 Sup. Ct. Rep. 285, the late lamented Chief Justice, speaking for the court, said:

> "Our jurisdiction to directly review depends upon the constitutional question, since

> the other matters relied upon are, as a general rule, within the exclusive jurisdiction of the circuit court of appeals of the ninth circuit, although, if power to review attaches to the case because of the constitutional question, that authority gives rise to the duty to determine all the questions involved * * *. Under these circumstances to prevent a disregard of the distribution of appellate power made by the Judicial Code, and to see to it that there is something on which our jurisdiction to review can rest, it behooves us in this, as in all other cases, to see whether the question upon which our power depends is really presented, and if not, because, although in form arising, it is in substance so wholly wanting in merit as to be frivolous, to decline the exercise of jurisdiction. * * * Coming to that subject, the entire absence of all ground for the assertion that there was a want of power in Congress for any reason to adopt the provision in question *is so conclusively foreclosed by previous decisions as to leave no room for doubt as to the wholly unsubstantial and frivolous character of the constitutional question based upon such contention* * * *." (Italics ours.)

It results from the foregoing that the allegations in the bill of complaint attacking the power and authority of the Public Utilities Commission of Kansas to change existing rates of public service companies present no real or substantial dispute as to the effect or construction of Section 10, Article 1, of the Constitution, for the reason that such contention has been expressly denied by former adjudications of this court. If the complaint

was that the power was improperly exercised there is no room for application of that section of the Constitution.

(c) The references in the bill of complaint to the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States present no real or substantial dispute as to the effect or construction of said amendments.

References to the 5th and 14th Amendments to the Constitution of the United States may be considered together inasmuch as, insofar as the present status of this case is concerned, all the rights guaranteed by the 5th Amendment are protected by the 14th Amendment and the reasons to be urged in support of the contention that the effect or construction of the former Amendment was not really and substantially involved in the instant case, are equally applicable to the same contention with respect to the latter Amendment.

It remains to examine those portions of the bill of complaint touching the Amendments in question and to test the substance thereof. These are the pertinent paragraphs. (Transcript of Record, pp. 4-5):

> "Third. Plaintiff further alleges that the added charges fixed by the order of the Public Utilities Commission dated March 25, 1918, Exhibit 'A' hereof, are preferential and discriminatory in that the rates and charges and added rates and surcharges are discriminatory against the plaintiff herein and against every large consumer of electricity and penalize the large consumer of electricity and particularly the plaintiff herein, which is

the heaviest consumer of electricity in the city of Wichita or on the lines of The Kansas Gas and Electric Company, and that such discrimination against the plaintiff and the rates fixed upon a scale increasing as the volume of consumption increases is in violation of every correct principle of rate making, in violation of the laws of the State of Kansas, under which said defendant commission is acting, and is discriminatory under both the State and Federal law, is the taking of the plaintiff's property without due process of law and the violation of Article 5 of the Amendments to the Constitution of the United States and of Article 14 of the Amendments to the Constitution of the United States and a denial of the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States; that by reason thereof, the order made by said Public Utilities Commission of the State of Kansas is discriminatory, nugatory and void and should be enjoined and set aside as hereinafter prayed.

Fourth. Plaintiff further alleges that said order of the defendant, The Public Utilities Commission of the State of Kansas, made on the 25th day of March, 1918, and the classification of consumers and the schedule of rates or added surcharges fixed therein are unlawful, unreasonable and discriminatory; that by reason thereof, the charges fixed against this plaintiff are unreasonably high and are confiscatory, and result in the taking of the property of the plaintiff without due process of law and deny to the plaintiff the equal protection of the law, in violation of the provisions of the Federal Constitution herein above referred to, and in violation of the laws of the State of Kansas and of every true principle of rate making. * * *"

Invoking the rule hereinabove quoted from *Empire State-Idaho M. Co.* v. *Hanley, supra,* appellees urge that a dispute or controversy as to the effect or construction of the Constitution does not appear on the record by a statement in legal and logical form such as good pleading requires and that as a result thereof jurisdiction of the District Court will not be held to rest also on the ground that the suit arose under the Constitution appellant having invoked that jurisdiction on the ground of diverse citizenship. The quoted portion of the bill of complaint represents an apparent effort to embody in the bill a "catch-all" allegation that is without color or substance. It complains that the order of the Commission violated principles of rate making, the statutes and laws of Kansas, and the Constitution of the United States and such matters are written without any semblance of clearness or particular application to the order in question.

But if the bill were taken to have sufficiently stated that the case involved a dispute and controversy as to the effect or construction of one of the Amendments to the Constitution, **the result of the suit did not and was never intended to depend upon the determination of any such question.** That fact clearly appears from admissions contained in appellant's motion for judgment on the pleadings.

By its motion for judgment on the pleadings (Transcript of Record, pp. 30-32) appellant moved the trial court for the entry of a final judgment and decree upon the pleadings which consisted of

the bill of complaint, the answer of The Public Service Commission, the intervening petition of appellee, Kansas Gas and Electric Company, and a stipulation and motion, the latter now irrelevant. The state of the pleadings upon the filing of appellant's motion was such that it stood admitted that the citizenship of the parties and the amount involved conferred jurisdiction upon the District Court; that the appellant and appellee Kansas Gas and Electric Company were public service companies between which there had been a contract fixing rates to be charged for electric energy; that The Public Service Commission of Kansas was such a body as its name implies and that upon application of appellee Kansas Gas and Electric Company, the appellee The Public Utilities Commission had entered the order complained of after a hearing participated in by appellant by which order the Commission found and ordered that until further order the appellee Kansas Gas and Electric Company should be permitted and authorized to add certain surcharges to its existing rates for electricity supplied to its consumers in the state of Kansas. It was also admitted that the terms, form and substance of the order were undisputed and as set out in the pleadings. It was denied that the added surcharge was unreasonable, discriminatory or confiscatory.

In that state of the pleadings the appellant moved, as already stated, for the entry of a final judgment and decree upon the pleadings. Summarizing the state of the record appellant in that motion said:

"Wherefore, plaintiff shows that the diversity of citizenship between the parties to this cause being admitted, and the amount of controversy being admitted to exceed three thousand dollars, exclusive of interest and costs, and it being admitted in this case that the final and determining issue is the binding effect upon this plaintiff of said order of said Commission as above set forth, and it appearing from an inspection of said order that the same is wholly void, insufficient, invalid and without binding effect, the necessity for extended hearing, and the introduction of voluminous, tedious and complicated evidence and proof is wholly unnecessary under the state of the pleadings in this cause of record appearing in this court, and in presenting its motion, plaintiff saves and reserves to itself all of its rights in the presentation of evidence and proofs and hearing upon the merits of the issues of fact and law, otherwise than as above stated involved in this cause, in the event it should be determined that final judgment and decree should not be entered pursuant to this motion and a similar motion herein filed by plaintiff against the defendant, The Public Service Commission of the State of Kansas." (Transcript of Record, p. 31.)

(It may be observed at this point that the Circuit Court of Appeals held in effect that appellant's attempted reservation embodied in the preceding quotation, was ineffective in view of the submission of the cause to the trial court upon the motion for final judgment and the admissions contained therein.)

It, therefore, appears the appellant counted upon the alleged patent invalidity of the order which it sought to enjoin and upon the alleged want of power and authority in the Commission to supersede contract rates and that the question of jurisdiction was treated by appellant as depending entirely upon diverse citizenship and the effect of Section 1, Article 10 of the Constitution (which had been settled by previous adjudications) to the total exclusion of any question of the effect or construction of the 5th or 14th Amendments. The alleged patent invalidity was based upon the order's failure to contain recitations of the Commission's findings of fact—a question involving only the construction of the Kansas statutes creating the Commission which could not under any view afford a basis of Federal jurisdiction. It has never been claimed there was anything on the face of the order or admitted by the pleadings which brought said order in conflict with either the 5th or 14th Amendments.

Clearly appellant did not intend and did not urge that the result be made to depend upon the effect or construction of either the 5th or 14th Amendments, and it should be held to have conceded that its references to those Amendments presented no real and substantial question of the kind necessary to deprive the judgment of the Circuit Court of Appeals of the finality which it would otherwise have.

(d) The decisions in the District Court and in the Circuit Court of Appeals did not involve or depend upon any constitutional or Federal question.

The trial court held that the order of The Public Utilities Commission of Kansas was void because there was not included in it a recitation of the findings of fact upon which to rest the jurisdiction and order of the Commission. The Circuit Court of Appeals for the Eighth Circuit held that the Kansas statutes creating the Commission and prescribing its powers and duties did not require such findings to be set out in the order. Both courts held against appellant's contention that a public service company's contract could not, without violating the Constitution, be superseded by the order of the Commission. This latter holding was under authority of *Union Dry Goods Company* v. *Georgia Public Service Corporation*, 248 U. S. 372; 63 Law Edition 309; 39 Sup. Ct. Rep. 117, and the earlier cases dealing with the same subject matter.

A casual examination of the opinions in both lower courts will convince that their decisions did not touch upon or involve the effect or construction of either the 5th or 14th Amendments and that appellant did not pursue in either of said courts its casual reference in the bill of complaint to the Amendments in question. All of which points to the fact that such references were unsubstantial and wholly ineffectual to confer jurisdiction upon the trial court but for the fact that

they were accompanied by proper and requisite allegations of diverse citizenship. The judgment and decree of the Circuit Court of Appeals was, therefore, final.

For all of the foregoing reasons it is urged that the appeal herein should be dismissed for want of jurisdiction. As an alternative it is urged that the alleged constitutional questions which it is claimed give the right to appeal from the judgment and decree of the Circuit Court of Appeals are so frivolous as not to need further argument, and that if not dismissed the judgment and decree should be affirmed.

A. E. HELM,
Counsel for the Public Utilities Commission of the State of Kansas, Appellee.

H. L. MCCUNE,
Counsel for Kansas Gas and Electric Company, Appellee.

No. ~~722~~. 717

In the Supreme Court of the United States

October Term, 1921.

THE WICHITA RAILROAD AND LIGHT COMPANY, *Appellant*,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS and KANSAS GAS AND ELECTRIC COMPANY, *Appellees*.

NOTICE.

To Messrs. Henry I. Green, Thomas F. Doran and Harris & Harris, Counsel for Appellant.

Please take notice that on Monday, the 30th day of January, 1922, at the opening of the court, or as soon thereafter as may be, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for a decision of said court thereon.

Herewith is a copy of the brief of argument to be submitted with the said motion in support thereof.

A. E. HELM,
Counsel for the Public Utilities Commission of the State of Kansas, Appellee.

H. L. MCCUNE,
Counsel for Kansas Gas and Electric Company, Appellee.

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No. 27

In the Supreme Court of the United States

October Term, A. D. 1922

Wichita Railroad and Light Company,
Appellant
vs.
Public Utilities Commission of the State of Kansas, and Kansas Gas and Electric Company,
Appellees

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY OF APPELLANT TO THE MOTION OF APPELLEES TO DISMISS OR TO AFFIRM

HENRY I. GREEN
THOMAS F. DOBAN
Counsel for Wichita Railroad & Light Company, Appellant.

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Reference to and comments upon authorities cited by appellees in support of their motion to dismiss or affirm.

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No. 217

In the Supreme Court of the United States

October Term, A. D. 1921

Wichita Railroad and Light Company, *Appellant* vs. Public Utilities Commission of the State of Kansas, and Kansas Gas and Electric Company, *Appellees*	Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY OF APPELLANT TO THE MOTION OF APPELLEES TO DISMISS OR TO AFFIRM

Comes now the appellant by its counsel and presents the following reply and brief of argument in support thereof, in answer to the motion of the appellees to dismiss the appeal herein, or in the alternative, to affirm the decree appealed from.

Henry L. Gray

Thomas F. Doran

Counsel for Wichita Railroad & Light Company, Appellant.

is so strongly relied upon by counsel for appellees, that it is *only where the public health, safety, good order, comfort, or general welfare so requires and demands,* that a state can lawfully and constitutionally abrogate an existing contract; and then *only when the power is appropriately exercised, under proper and sufficient pleadings, proof, determination, and findings* in the proceedings before the commission sitting as an *administrative* tribunal.

The true question involved in this direct (not collateral) attack on the commission's order is whether or not an administrative tribunal acting under authority derived wholly from a state law, can legally abrogate a contract entered into long prior to the creation of the state regulating tribunal, the public utilities commission, upon a record which affirmatively shows,

(1) That no sufficient petition was ever filed with the state commission referring in any way to an existing contract, and no reference is found concerning such contract either in the pleadings before the commission or the order entered by it;

(2) That the statute from which the state commission derives its powers and jurisdiction, specifically requires a finding by the commission that an existing contract is unreasonable, excessive or discriminatory, *before* the commission can rightfully claim to possess any jurisdiction to abrogate or annul such contract; and no such finding is made by the commission.

> (See Secs. 13, 14 and 16 of the Kansas Public Utilities Act, cited at pages 50 to 54 of "brief on behalf of appellant" heretofore filed by us with this court in this cause).

(3) That the tribunal whose order is claimed to abrogate an existing contract, possesses under the laws of the state only administrative powers and does not possess either legislative or judicial power.

(4) That the order of the commission which it is claimed operates to abrogate the existing con-

tract, contains no findings of fact necessary as a condition precedent to clothe the commission with power or authority to enter any order which by any proper construction can be said to annul or abrogate any existing contract; and

(5) That under the police power, the commission was without jurisdiction *in the particular case* to enter any valid order affecting an existing contract.

A further and important question presented to this court is whether or not the Circuit Court of Appeals in reversing a decree of the district court which was entered upon an interlocutory motion, can deprive the litigant which was successful in the district court, but unsuccessful in the circuit court of appeals, from having a trial upon the merits of the cause of action presented by the bill of complaint.

In this case counsel for appellees advance the proposition that any state may by statute, give to an administrative tribunal which the state legislature creates, the power from the mere caprice or whim of such administrative tribunal, to abrogate and annul the terms and provisions of any contract fixing and prescribing rates and conditions for furnishing electric power; that such administrative tribunal may, by a general blanket order, set aside, abrogate and annul all contracts, the provisions of which conflict with such order, and may do this without the issue being presented to the administrative tribunal by any pleading or averment whatsoever; and also that the order entered by such administrative tribunal shall be binding as against the terms and provisions of a written contract, without any averment, finding or conclusion that the public interest so requires, or even that the public interest is involved or affected by the terms and provisions of the contract so abrogated and annuled.

Counsel for appellees contend that because this court has held that a state has the power to abrogate

contracts fixing rates to be charged by a public utility, this precludes any inquiry into the methods or procedure employed by the state in abrogating such contracts.

In other words, appellees' counsel contend that it is not necessary that there be an averment or claim by the petitioner seeking to abrogate a contract, nor any finding or determination by the State Utility Commission, that the public interest is in any way affected by the terms of the contract, nor that the terms of the contract are unreasonable or unremunerative to the petitioner; they contend that when a public utility commission enters an order abrogating a contract rate, the parties to the contract are foreclosed from any judicial inquiry by the federal courts either as to the jurisdiction of the commission to enter such an order, or as to the legality of the order under the due process clauses of the federal constitution; and they also contend that when one of the parties to such contract seeks to protect itself against the enforcement of such an order of an administrative tribunal, under its constitutional rights as guaranteed by Section X of Article 1, and by the Fourteenth amendment to the federal constitution, no issue is presented sufficient to give the Federal Courts jurisdiction of the controversy.

Appellees' counsel charge in their motion to dismiss or affirm, that an issue and controversy of the character above set forth, is not real or substantial, but is frivolous.

Yet the record in this case shows that in the courts below, three separate opinions have been written by three different judges, two of which reach the conclusion that the order of the commission to enjoin the enforcement of which the bill of complaint was filed, was and is absolutely void on the face of the record as disclosed by the pleadings; and the third opinion merely finds that there is not sufficient appearing upon the face of the record to show that the order is void. And it so happens that the fourth judge who has considered

the case in the courts below, joins in the particular opinion which finds the record sufficient to sustain the order; thereby putting upon the Street Railway Company, appellant herein, the burden of taking the appeal from such majority opinion, although in point of numbers, the able jurists who have considered this case in the District Court and Circuit Court of Appeals, have tipped the scales of justice to an even balance.

We assume that the important portions of the record in this case necessary to be considered on this motion, are:—

FIRST:—The bill of complaint filed in the District Court which contains as a part thereof three important exhibits, namely, the petition filed by appellees with the Public Utilities Commission of Kansas, the contract between appellant and the Kansas Gas & Electric Company, and the order entered by the commission, the enforcement of which the appellant by its bill of complaint seeks to enjoin; which exhibits are by specific reference made a part of the bill of complaint. (Trans. of Rec. pages 2 to 20, inclusive);

SECOND:—The opinion of the District Court granting to the plaintiff, appellant herein, the relief prayed in its bill of complaint. (Trans. of Rec. pages 32 to 44, inclusive).

THIRD:—The opinion of the Circuit Court of Appeals reversing, by a divided court, the decree of the District Court. The majority opinion appearing in the transcript of the record pages 53 to 60, and the dissenting opinion of Circuit Judge Sanborn appearing at pages 61-62.

We believe that an examination of the portions of the record just indicated will convince your honors that the issues presented on this appeal are of far-reaching importance, and furnish to this court an initial opportunity to define and limit the powers and prerogatives of state administrative tribunals, who

are daily assuming jurisdiction to arbitrarily interfere with the private property rights of citizens, and confiscate private property, in defiance of the protection presumed to obtain under the due process clauses of the Federal Constitution.

In other words, the record here presents a case where a public utilities commission acting under state law, has attempted to exercise an arbitrary power which neither an executive, a legislature, nor a court possesses. The executive, legislative and judicial agencies of the state are bound to act within the limits of the police power; while in the instant case the Kansas Public Utilities Commission has assumed the right to act arbitrarily, and in disregard of the limitations of the police power.

The bill of complaint (including the exhibits thereto) filed by appellant in the District Court for the District of Kansas, First Division, appears pages 2 to 20, inclusive, of the transcript of the record filed herein.

In addition to the allegations of the bill showing diversity of citizenship of the different parties to the suit, (which allegations were made solely to show that the venue lay in the District of Kansas, First Division, and which were not claimed by the bill of complaint as any ground of federal jurisdiction,) it is clearly and distinctly charged that the suit is filed by the appellant to protect its rights under certain provisions of the Federal Constitution.

A brief reference to these allegations will disclose that the substantive questions involved in the merits of the case present a controversy arising under the Federal Constitution. The decision of the case involves a construction and application of the provisions of Section X, Article 1 and of the 14th Amendment to the Constitution of the United States as applied to the

facts set forth by the averments of the bill of complaint.

The bill of complaint alleges:—

1. That the plaintiff, appellant herein, entered into a written contract with the Kansas Gas & Electric Company in the year 1910, which by its terms continues until the year 1930, for the purchase by appellant of electric current from the Kansas Gas & Electric Company; a true copy of the contract is attached to and made a part of the bill of complaint as Exhibit B thereof. (Transcript of Record pages 8-17).

2. That on January 22, 1918, the Kansas Gas & Electric Company filed with the Kansas Public Utilities Commission, its so-called "application to add a surcharge to certain of its rates for electricity"; and a copy of this so-called application is attached to and made a part of the bill of complaint as Exhibit C thereof. (Transcript of Record pages 18-20).

3. That notice of the filing of the application aforesaid having been given to the plaintiff, appellant, it had objected to the jurisdiction of the Kansas Public Utilities Commission over the plaintiff, and protested and objected to that administrative tribunal assuming any jurisdiction under said application to change or modify the written contract between the appellant and appellee, Kansas Gas & Electric Company.

4. That notwithstanding the objections of the plaintiff to the jurisdiction of the Kansas Public Utilities Commission, that administrative tribunal had "without jurisdiction or warrant of law", made and entered as of March 25, 1918, its pretended order purporting to grant to the Kansas Gas & Electric Company, appellee, the right to add surcharges to certain of its existing rates, including the contract rates in question but in no way referring to such contract rates; and a copy of the said order of the Commission is attached to, and made a part of the bill of complaint as Exhibit A thereof. (Trans. of Rec. pages 6-8).

5. That the order of the Kansas Public Utilities

Commission purporting to give the Kansas Gas & Electric Company authority to add the said surcharges, is as to the plaintiff, appellant herein, nugatory and void, and the enforcement thereof as to the contract rates under the contract between the plaintiff and the appellee, Kansas Gas & Electric Company, should be enjoined and set aside, and the order be held and declared void and of no effect; and the bill of complaint specifically charges:—

(a) That the Kansas Public Utilities Commission was without jurisdiction or authority to hear or determine any question relative to the plaintiff, appellant, or its business, rules, regulations, or rates, for the reason that it conducts its business wholly within the City of Wichita, and is not subject to control or regulation by the Kansas Public Utilities Commission. (This, by virtue of a specific provision of the Kansas Statute, which has not been argued on this appeal).

(b) That said commission was and is without power and authority to change and modify the written contract fixing the rates, rules, regulations and conditions upon and under which the Kansas Gas & Electric Company delivers electric current to the plaintiff; and with respect to this allegation, the bill of complaint sets forth with particularity, the infirmities of the so-called application of the Kansas Gas & Electric Company filed with the commission.

The bill alleges that if the Kansas Gas & Electric Company is not receiving sufficient revenues from its business, its failure in that respect is not due to the contract between the plaintiff herein and the said gas and electric company nor the rates and charges fixed in said contract; that the rates and charges fixed in the contract are reasonable and just and remunerative and not preferential or discriminatory, *and places no undue burden on the other customers of the Kansas Gas & Electric Company, or upon the public.*

The bill alleges that the Kansas Gas & Electric Company is enabled to sell current to its other customers and to the public at a less rate than it would

otherwise be compelled to charge them, were it not for the fact that the plaintiff is furnished a large amount of current at particular hours of the day under the terms and conditions of the contract for the purchase and use by it of current from said Kansas Gas & Electric Company.

The bill of complaint charges that the regulation and change of the rates fixed in this written contract are not within the police power of the State of Kansas under an application of the character that had been filed by the gas and electric company with the Public Utilities Commission of the State of Kansas. It is specifically charged in the bill of complaint that said contract is within the protection of Section 10 of Article 1 of the Constitution of the United States which forbids any state to pass any law impairing the obligation of contracts.

The bill of complaint therefore shows that the jurisdiction of the federal court is invoked because by no appropriate pleading, finding or order, has it been shown that any public interest requires or justifies any change in the terms of said written contract, and that in fact *no public interest was involved* in the subject matter of the proceeding before the Public Utilities Commission.

The bill of complaint further charges that if in the character of proceeding in which the order in question had been entered by the Kansas Public Utilities Commission, the law creating the commission and defining and prescribing its duties and obligations is construed to be made applicable to the contract in question, then such law is repugnant to the provisions of the Federal Constitution and therefore null and void, and that the order promulgated by said Commission attempting to abrogate said contract, is nugatory and void and the enforcement thereof should be enjoined.

(c) That the rates and charges and added rates and surcharges attempted to be fixed by the Public Utilities Commission in said order (Exhibit A to the

bill of complaint), are preferential and discriminatory against the plaintiff and against every large consumer of electricity and penalizes the large consumers of electricity and particularly the plaintiff, which is the heaviest consumer of electricity in the City of Wichita or on the lines of the appellee, Kansas Gas & Electric Co., and that such discrimination against the plaintiff and the fixing of rates upon a plan increasing as the volume of consumption increases, violates every correct principle of rate making, violates the laws of the state of Kansas under which the defendant Commission is acting, and that said order is discriminatory under both the state and federal law.

The bill of complaint specifically avers that the order in question if enforced, would take the plaintiff's property without due process of law in violation of Article XIV of the amendments to the Constitution of the United States and is a denial to the plaintiff of the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States; that therefore the order is nugatory and void.

(d) That the order of the defendant, Public Utilities Commission of the State of Kansas, entered March 25, 1918, and the classification of consumers and the schedule of rates and added surcharges fixed therein, are unlawful, unreasonable and discriminatory; and that by reason thereof the charges fixed against the plaintiff are unreasonably high, *and are confiscatory and result in the taking of the property of the plaintiff without due process of law, and deny to the plaintiff the equal protection of the law in violation of the provisions of the Federal Constitution herein above referred to.*

The bill of complaint thereupon prays that the order of the Public Utilities Commission of the State of Kansas made and filed on March 25, 1918, be declared discriminatory, excessive, unreasonable, confiscatory and void, in violation of the laws of the State of Kansas and of the United States.

It is clear therefore that the bill of complaint invoked the jurisdiction of the federal court on the ground:—

FIRST, That the plaintiff was threatened with having its property taken without due process of law;

SECOND, That without any allegation or claim of any public interest authorizing it so to do, an administrative tribunal of the State of Kansas, acting under pretended authority of a statute of that state, had attempted to abrogate and annul the terms and provisions of a solemn and binding contract between the plaintiff and the Kansas Gas & Electric Company; and

THIRD, That said administrative tribunal had entered an order which placed an excessive and unreasonable burden upon the plaintiff and discriminated against it by attempting to fix rates in violation of the existing contract, and that the rates so prescribed by said Commission order are not only different from rates prescribed for other customers of the gas and electric company, but are fixed on a different basis, and are especially discriminatory against the plaintiff.

In this connection it is important to note that the plaintiff was the only customer in the class to which the high surcharge rates were made applicable, and that out of approximately 19,900 consumers served by the Kansas Gas & Electric Co., more than 19,000 of them were entirely exempted from the payment of any proposed surcharge whatever; less than 50 of the entire number of consumers were by the order required to pay any added surcharge to their existing rates. This on its face discloses the unwarranted discrimination against the plaintiff. The mere statement of the fact proves that the plaintiff was by the order sought to be denied its right to equal protection of the law.

This brief reference to the issues raised by the bill of complaint shows that the federal jurisdiction was invoked on other grounds than diversity of citizenship of the two original parties to the suit; and the three opinions rendered by the lower courts in

this case show that the real merits of the case involve questions arising under the Constitution of the United States.

The District Court held the order void on its face (Trans. of Rec. p. 43),

> "(1) Because there is neither found nor stated in said order any reason, ground or justification for annulling and abrogating the contract between the parties, valid when made and in full force, effect and operation when the Public Utilities Commission came into existence as a creature of the State;
>
> (2) For the reason that no facts are found or stated in the order of the Commission sustaining or tending to sustain the exercise of its statutory powers and functions as prescribed in the public utilities act; and further no finding of the reasonableness or unreasonableness of the contract rates existing between the parties is made, and no finding is made showing or tending to show any discrimination between the contract rates and other rates of charge for service charged other members of the public, or other justification or excuse for the making of the order except the mere caprice or whim of the Commission based on the ground that the net revenues of intervener will be temporarily decreased if certain other changes in rates shall in the future be made by the Commission.

The provisions of the Kansas Statutes prescribing the conditions upon which the Utilities Commission has any jurisdiction to fix rates are quoted at page 50 et seq. of our original briefs filed herein.

The dissenting opinion of presiding Judge Sanborn in the Circuit Court of Appeals, (Trans. of Rec. p. 61), declares that the order should be held void because the petition which had been filed by the Kansas Gas & Electric Company, appellee, with the Kansas

Public Utilities Commission, was not sufficient to confer jurisdiction upon that tribunal to modify or abrogate the contract between the plaintiff and the Kansas Gas & Electric Company for furnishing the electric power which was the subject matter of the contract.

Judge Sanborn points out tersely but clearly, wherein the petition which had been filed with the Public Utilities Commission was not sufficient to confer jurisdiction on that tribunal to enter any order abrogating the contract in question.

In his dissenting opinion, Judge Sanborn concludes:

> "The petition (filed with the Kansas Commission by the appellee gas & electric company), does not show what profits the gas & electric company derived from the contract rates during the years prior to 1917. It does not show that the contract rates have been or will be confiscatory. It does not show that the welfare of the public demands the increase, and in my opinion it states no facts or case within the jurisdiction of the Commission; its order was made without jurisdiction and is void.'

In Railroad Commission v. Worthington, 225 U. S. 101, 56 L. Ed. 1004, this court said:—

> "An examination of the bill in this case, which was filed under the authority of the circuit court, shows that the order of the commission was attacked, not only upon the ground that its findings were alleged to be unsupported by the testimony and to have been made upon improper consideration of the facts, but also because the order affected and interfered with interstate commerce, in which the complainant was engaged and over which the Railroad Commission of Ohio had no authority because of the commerce clause of the Federal Constitution. *It further was alleged that the owners of the property con-*

stituting the receivership estate would be deprived thereof without due process of law; that they would be denied the equal protection of the laws, and that their property would be taken without compensation. It thus appears that jurisdiction was invoked, not only because the present case is ancillary to the receivership suit which depended upon diverse citizenship, but upon grounds which involve alleged infractions of the Federal Constitution and rights secured thereby. The case was therefore one which might have been taken to the circuit court of appeals, and the fact that it involved grounds which might have warranted a direct appeal to this court did not deprive the circuit court of appeals of jurisdiction"

"The question, then, is: Is this one of the cases made final in the circuit court of appeals by the act creating that court? The 6th section of that act provides that the judgment of the circuit court of appeals 'shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also, in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases'. In all other cases there is a right of review by this court if the matter in controversy exceeds $1,000. It is averred in the bill and admitted in the answer that the amount in dispute exceeds in value the sum of $5,000. The case is therefore one not made final in the circuit court of appeals, and the appeal to this court was properly allowed."

In this case the bill charges and the answers admit that the amount in controversy exceeds $1000.00.

In Henningsen v. United States Fidelity & Guaranty Co. et al, 208 U. S. 404; 52 L. Ed. 547.

this court said:—

> "A motion is made to dismiss on the ground that the jurisdiction of the circuit court was invoked solely on the ground of the diversity of citizenship of the parties, and hence the decree of the circuit court of appeals was final. The motion must be overruled. Diversity of citizenship was, it is true, alleged in the bills, but grounds of suit and relief were also based on the statutes of the United States as from the discussion of the merits will be seen. Those statutes entered as elements into the decision of the circuit court of appeals and were necessary elements."

In F. C. & P. R. R. Co. v. Bell, et al., 176 U. S. 321, 44 L. Ed. 486, the rule was announced in the following language:

> "As, then, the plaintiffs in the circuit court claimed in their declaration that the controversy was one that turned on a construction of the laws of the United States, *and as both the courts below dealt with the case on that assumption,* it is plain that it can not be successfully contended in this court that the judgment of the circuit court of appeals was final because the jurisdiction of the circuit court was dependent entirely upon the opposite parties being citizens of different states."

In Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. Ed. 575,

a motion was made to dismiss the appeal for the reason assigned that the jurisdiction of the Circuit Court was invoked upon grounds of diverse citizenship, and therefore the decree of the circuit court of appeals was final. In disposing of the motion, this court used the following language:—

> "But to impress the attribute of finalty upon a judgment of the circuit court of appeals,

> it must appear that the original jurisdiction of the circuit court was dependent 'entirely' upon diverse citizenship. That is not the case here. Plaintiff's bill does, indeed, set up a diversity of citizenship as one ground of jurisdiction, but, as it appears that its title rests upon a proper interpretation of the land grant act of 1864 as to the exception of nonmineral lands, there is another ground wholly independent of citizenship under that clause of Section 1 of the act of 1888 clothing the circuit court with jurisdiction of all civil suits involving over $2000, 'and arising under the constitution or laws of the United States'. If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States."

Realizing that this is not a question with the disposition of which this court is unfamiliar, we deem the citation of numerous authorities unwelcome.

This court has consistently held that it will look to the averments of the bill of complaint to determine whether or not the case there presented is one which involves the construction or application of the constitution or laws of the United States as the basis of jurisdiction in the Federal courts. If it is disclosed upon an inspection of the bill of complaint that the case is one involving the construction or application of any of the provisions of the Federal Constitution, then in such case the judgment or decree of the Circuit Court of Appeals is not final, and may be reviewed on further appeal to this court.

It is clear that the bill in this case was filed by the plaintiff to secure to itself the protection afforded by the specific provisions of the Constitution of the United States, which the bill of complaint charged were about to be violated by the enforcement of the order of the Kansas Public Utilities Commission purporting to abrogate and annul the existing contract between the plaintiff and the Kansas Gas & Electric Company.

It is unnecessary to argue to this court that if the order of the Kansas Public Utilities Commission was entered without jurisdiction or was void on its face for the reasons assigned by the district court in the opinion rendered by Judge Pollock, or that the effect of the order, if enforced, would deprive the plaintiff of its contractual rights—then in either of such events, there was a want of due process of law to sustain the order of the Commission.

In addition also, we earnestly contend that the plaintiff was entitled, in any event, to a trial upon the merits of the allegations in its bill of complaint that the enforcement of the order would confiscate the property of the plaintiff contrary to the protection afforded by the federal constitution.

The majority opinion appealed from entirely deprived the plaintiff of any right to a trial upon the merits. It attempted to dispose of the whole case in the decision of an interlocutory motion.

The allegations of the bill of complaint that the plaintiff was about to have its property confiscated, clearly presented a federal question sufficient to confer jurisdiction on the district court, and is a complete answer to the claim that no federal question was involved. Therefore, under the settled law, the plaintiff is entitled to appeal to this court from the decision of the circuit court of appeals.

At all times it must be borne in mind there is no right of appeal provided by the Kansas Statute from the orders of the Public Utilities Commission; they can only be reviewed by the commencement of an original proceeding, which is a direct attack upon the validity of the commission order.

This is therefore a direct (not collateral) attack on the order of the Public Utilities Commission.

A brief reference to the authorities cited by counsel for appellees in support of their motion to dismiss or affirm, may prove helpful.

The first case cited by appellees counsel in support of their position, is

> Empire State Idaho Mining Co. v. Hanley, 198 U. S. 292, 49 L. Ed. 1056.

In that case the court points out in the opinion that,

> "The Constitution and laws of the United States were not mentioned in the complaint nor any dispute or controversy raised as to the effect or construction of the Constitution or laws on the determination of which the result depended; nor was any title, right, privilege or immunity specially set up or claimed under Constitution or law".

Of course in that case this court was without appellate jurisdiction.

The next case they cite is

> Arbuckle v. Blackburn, 191 U. S. 405; 48 L. Ed. 239.

Chief Justice Fuller, after repeating the rule governing appellate jurisdiction in this character of case, said:

> "The averments of this bill did not bring the case within that rule, for they put forward no existing controversy as to the effect or construction of the Constitution, on which the relief depended, and set up no right which might be defeated or sustained according to such construction."

Chief Justice Fuller concludes the opinion with this language:

> "Whatever grounds of equity interposition may have existed here, and we express no opinion on that subject, the jurisdiction of the circuit court as a court of the Unied States depended alone on diverse citizenship. *If the allegation of that fact had been omitted from the bill, the jurisdiction could not have been maintained.*"

They next cite

> Western Union Telegraph Co. v. Ann Arbor R. Co. 178 U. S. 238; 44 L. Ed. 1052.

In that case the only language used in the bill of complaint, as pointed out by this court in the opinion, from which any inference could be drawn that any law of the United States was involved, was the general allegation that under the provisions of the statutes of the United States the Telegraph Company had the right to maintain its telegraph lines on the right of way of the defendant railroad company. It was in no way alleged that the basis of the cause of action was any alleged violation of any law of the United States, nor that it involved the construction or application of the constitution or any federal statute.

They next cite

> Spencer v. Duplan Silk Co., 191 U. S. 526; 48 L. Ed. 287.

In the opinion in that case we find this language:

> "The plaintiff, in her complaint, did not claim any right under the Constitution and laws of the United States, or in any way mention or refer to those laws; and, at the trial, she relied wholly upon a right given by the common law, and maintained her action upon

> such right only. It was the defendant, and not the plaintiff, who invoked the Constitution of the United States. This, as necessarily follows from the foregoing considerations, and as was expressly adjudged in Colorado Central Consol. Mining Co. v. Turck, 150 U. S. 138, 37 L. Ed. 1030, is not sufficient to support the jurisdiction of this court to review by appeal or writ of error the judgment of the Circuit Court of Appeals."

The rule being that this court will look to the bill of complaint and not to the answer or pleas of the defendant to determine whether a federal question was involved, of course the court could do nothing else in that case but dismiss the appeal.

The next case they cite is

> Shulthis v. McDougal, 225 U. S. 561; 56 L. Ed. 1205.

In that case it was sought to confer appellate jurisdiction in this court because the case involved the title to lands which had been acquired under federal law. In disposing of the motion challenging the appellate jurisdiction of this court, Mr. Justice Van Devanter tersely and clearly applies the rule as follows:

> "But the bill makes no mention of those statutes or of any controversy respecting their validity, construction, or effect. Neither does it by necessary implication point to such a controversy. True, it contains enough to indicate that those statutes constitute the source of the complainant's title or right, and also shows that the defendants are in some way claiming the land, and particularly the oil and gas, adversely to him; but beyond this the nature of the controversy is left unstated and uncertain. Of course, it could have arisen in different ways, wholly independent of the source from which his title or right was derived *So, looking only to the bill, as we have seen that we must, it cannot be held that the case as therein stated was one arising under the statutes mentioned.*"

The last case cited by Appellees' counsel in support of their motion, is

> Roman Catholic Church vs. Pennsylvania Railroad Co. 237 U. S. 575; 59 L. Ed. 1119.

In that case there were some vague references to the Constitution of the United States without attempting to designate any section or article or amendment or sentence of the Federal Constitution, nor how they were in any way involved in the controversy.

This court speaking through Mr. Chief Justice White, held that

> "As from any point of view it is impossible, because of the vagueness of these averments, to escape, to say the least, doubt as to whether the bill asserted rights under the Constitution and laws of the United States which would be adequate to sustain the jurisdiction of the circuit court if the allegations of diversity of citizenship were stricken out, it follows that they are not sufficient to sustain the claim of jurisdiction."

We therefore insist that it is clear, when the authorities cited by counsel for appellees to sustain their motion to dismiss, are examined and applied to the state of the record under the allegations of the bill of complaint or declaration in the particular case, they can not be said to be authority in this case.

In the case at bar, the averments of the bill positively and amply assert the claims of the plaintiff, appellant herein, to the protection of specific provisions of the Federal Constitution,—in the plaintiff's effort to avoid confiscation of its property and prevent the obligation of its contract being impaired. It has even been denied a hearing upon the merits in this proceeding where no issue was presented as to any public interest authorizing even an investigation as to the reasonableness of the terms and provisions of the contract between the two utilities, parties to the suit.

We believe that upon the consideration of this case by this court, a most timely opportunity will be afforded for judicial expression defining and announcing the limitations upon the arbitrary powers and prerogatives which are now being asserted and exercised by these public utility commissions in their interference with private property and contractual rights; and also to check their unwillingness or inability from lack of understanding, or indifference to property rights, to follow the law of the land and observe the constitutional mandates forbidding them as agents of the state to deprive citizens of their property without due process of law.

Respectfully submitted,

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